Menara PanGlobal Sdn Bhd v Arokianathan a/l Sivapiragasam

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W–04–13 OF 2003
MOHD GHAZALI, HASHIM YUSOFF AND JAMES FOONG JJCA
12 APRIL 2006

Labour Law — Industrial Court — Award — Judicial review — Principles to be applied — High Court ordered mandamus to fix matter re-adjudication before another Chairman — High Court did not make any order with regards to the application for certiorari — Whether award liable to be quashed — Whether there was error of law on the face of the award — Whether High Court had exercised appellate powers instead of judicial review process — Industrial Relations Act 1967 s 20

The respondent, who was an employee of the appellant, a locally incorporated company, considered that he was dismissed by the appellant without just cause or excuse and hence made representations in writing to the Director General for Industrial Relations pursuant to the provisions of s 20 of the Industrial Relations Act 1967 ('the Act') to be reinstated to his former employment. The representations were subsequently referred to the Industrial Court for an award. The Industrial Court concluded that the respondent's dismissal was with just cause and excuse and hence dismissed the claim. The respondent, upon leave being granted by the High Court, applied for an order of certiorari to quash the award of the Industrial Court and for an order of mandamus to direct the Registrar of the Industrial Court to fix the matter for re-adjudication before another Chairman of the Industrial Court. The learned judge of the High Court ordered that mandamus be issued directing the Registrar of the Industrial Court to fix the matter for re-adjudication before another Chairman. He did not however make any order with regards to the application for certiorari. The appellant appealed.

Held, allowing the appeal:

(1) In dealing with judicial review, a judge should have the following principles, inter alia, in the forefront of his mind: (i) judicial review is not an appeal from a decision but a review of the manner in which the decision was made; (ii) the High Court is not entitled on an application for judicial review to consider whether the decision itself, on the merits of the facts, was fair and reasonable; (iii) the High Court, through judicial review, should not introduce technicalities of the court of law to the Industrial Court; this would certainly be so as s 30(5) of the Act imposes a duty upon the Industrial Court to have regard to substantial merits of a case rather than to technicalities and it also requires the Industrial Court to decide a case in accordance with equity and good conscience; (iv) the main and only function of the Industrial Court in

dealing with a reference under s 20 of the Act is to determine whether the misconduct or irregularities complained of by the management as to the grounds of dismissal were in fact committed by the workman and if so, whether such grounds constitute just cause or excuse for the dismissal; (v) the Industrial Court should not be burdened with the technicalities regarding standard of proof, the rules of evidence and procedure that are applied in the court of law; and (vi) the High Court will not interfere with finding of facts by the Industrial Court unless the same are completely unsupported by evidence and further, will not interfere merely because it may come to different conclusions on facts on the basis of the same evidence; weighing and assessing the evidence of the witnesses is the function of the Industrial Court and not that of the High Court (see para 37).

(2) The learned Chairman of the Industrial Court heard the facts, had seen the witnesses and had drawn his own conclusions from what was presented before him. These were matters for the Industrial Court and not for the High Court to determine (see para 39); *Harpers Trading (M) Sdn Bhd v National Union of Commercial Workers* [1991] 1 MLJ 417 followed.

(3) There was no ground for the court to issue certiorari to quash the decision of the learned Chairman. There was nothing to suggest that the decision to dismiss the respondent was irrational. The punishment of dismissal was proportionate under the circumstances of the case against the respondent. Applications for prerogative orders are not appeals and neither the High Court nor the Court of Appeal was entitled to review the merits of any decision reached by the Industrial Court. Certiorari is given only in cases where an error of law is disclosed. The learned judge in High Court did not seem to have directed his mind to the circumstances in which the decision was reached by the Industrial Court but only to the merits of the decision reached (see para 42).

(4) The application for certiorari as prayed for by the respondent in the High Court was dismissed. The learned Chairman, as can be seen from his grounds of decision, correctly approached the reference under s 20 of the Act. At the outset, he had asked himself the correct question, viz, whether the respondent had been dismissed without just cause or excuse (see para 43).

(5) The learned Chairman had committed no error of law. He applied the principles that was required of him in dealing with the representation under s 20 of the Act and found on the facts available to him that the dismissal of the respondent had been shown to be justifiable. He was satisfied that the appellant has shown that the decision to dismiss the respondent was under the circumstances, a reasonable and fair decision and that the negligence of the respondent in losing the security passes is of sufficient gravity to warrant dismissal (see para 44).

(6) The order of mandamus granted by the learned judge in the High Court was set aside. The mandamus cannot stand for two reasons. Firstly, since no certiorari was issued to quash the award of the Industrial Court, strictly speaking, the award of the Industrial Court still stood. Secondly, the mandamus was issued after the High Court had exercised appellate powers

instead of judicial review process. The learned judge's conclusion that the Industrial Court erred was clearly an unwarranted exercise of appellate powers. The High Court should not interfere with the decision of an Industrial Court unless there was a real error of law. A reading of the judgment of the learned judge made it clear that he was criticising the Industrial Court's finding based on credibility of witnesses. This was wholly outside the scope of judicial review and for that reason alone the judgment of the learned judge cannot stand. A mandamus cannot be issued under such circumstances. The learned judge exceeded his role as a court of judicial review (see para 45).

[Bahasa Malaysia summary

Responden, yang merupakan pekerja perayu, sebuah syarikat yang ditubuhkan di sini, menganggap dirinya telah dipecat oleh perayu tanpa sebab atau alasan yang adil dan oleh itu telah membuat representasi secara bertulis kepada Pengarah Besar Perhubungan Perusahaan menurut peruntukan s 20 Akta Perhubungan Perusahaan 1987 ('Akta tersebut') untuk mengembalikan kedudukan asal jawatannya. Representasi tersebut kemudiannya telah dirujuk ke Mahkamah Perusahaan untuk suatu award. Mahkamah Perusahaan memutuskan bahawa pemecatan responden adalah dengan sebab dan alasan yang adil dan oleh itu telah menolak tuntutan itu. Responden, setelah kebenaran diberikan oleh Mahkamah Tinggi, telah memohon untuk satu perintah certiorari untuk membatalkan award Mahkamah Perusahaan dan untuk satu perintah mandamus untuk mengarahkan Pendaftar Mahkamah Perusahaan menetapkan perkara untuk pengadilan semula di hadapan Pengerusi Mahkamah Perusahaan yang lain. Hakim Mahkamah Tinggi yang bijaksana telah memerintahkan agar mandamus dikeluarkan dengan mengarahkan Pendaftar Mahkamah Perusahaan untuk menetapkan perkara tersebut untuk pengadilan semula di hadapan Pengerusi lain. Beliau bagaimanapun tidak membuat apa-apa perintah berhubung permohonan certiorari tersebut. Perayu telah merayu.

Diputuskan, membenarkan rayuan tersebut:

(1) Dalam mengendalikan semakan kehakiman, seorang hakim perlu mengikuti prinsip-prinsip berikut, antara lain, dalam pemikirannya: (i) semakan kehakiman bukan satu rayuan daripada keputusan tetapi satu semakan dengan cara mana keputusan itu dibuat; (ii) Mahkamah Tinggi tidak berhak atas satu permohonan semakan kehakiman untuk menimbangkan sama ada keputusannya, atas merit fakta-fakta, adalah adil dan munasabah; (iii) Mahkamah Tinggi, melalui semakan kehakiman, tidak patut mengemukakan keteknikan mahkamah undang-undang kepada Mahkamah Persahaan, ini sewajarnya kerana s 30(5) Akta tersebut mengenakan satu kewajipan ke atas Mahkamah Perusahaan untuk mengambilkira merit kes yang substantif daripada keteknikan dan ia juga menghendaki Mahkamah Perusahaan untuk memutusakan satu kes menurut nurani yang baik dan saksama; (iv) satu-satunya fungsi utama Mahkamah Perusahaan dalam mengendalikan kes yang dirujuk di bawah s 20 Akta tersebut adalah untuk menentukan sama ada salah laku atau salah arah yang diadukan oleh pengurusan berhubung alasan pemecatan sememangnya telah dilakukan oleh

pekerja itu dan jika begitu, sama ada alasan tersebut membentuk sebab atau alasan yang adil untuk pemecatan tersebut; (v) Mahkamah Perusahaan tidak sepatutnya dibebani oleh keteknikan piawai pembuktian, rukun keterangan dan prosedur yang digunakan di mahkamah undang-undang' dan (vi) Mahkamah Tinggi tidak akan campur tangan dengan penemuan fakta oleh Mahkamah Perusahaan kecuali ia tidak disokong oleh keterangan dan juga, tidak akan campur tangan hanya kerana ia mungkin akan memperoleh keputusan berbeza berdasarkan fakta yang digunakan dalam keterangan yang sama; mengimbangi dan menilai keterangan saksi-saksi adalah fungsi Mahkamah Perusahaan dan bukan Mahkamah Tinggi (lihat perenggan 37).

(2) Pengerusi Mahkamah Perusahaan yang bijaksana telah mendengar fakta-fakta, melihat saksi-saksi dan membuat kesimpulan sendiri berdasarkan apa yang dikemukakan di hadapannya. Berikut adalah perkara-perkara untuk ditentukan oleh Mahkamah Perusahaan dan bukan Mahkamah Tinggi (lihat perenggan 39); *Harpers Trading (M) Sdn Bhd v National Union of Commercial Workers* [1991] 1 MLJ 417 diikut.

(3) Tiada alasan untuk mahkamah mengeluarkan certiorari bagi membatalkan keputusan Pengerusi yang bijaksana. Tiada apa untuk mencadangkan bahawa keputusan untuk menolak responden adalah tidak munasabah. Hukuman pemecatan adalah sesuai dalam keadaan kes terhadap responden. Permohonan untuk perintah prerogatif bukan merupakan rayuan dan Mahkamah Tinggi maupun Mahkamah Rayuan tidak berhak untuk menyemak merit mana-aman keputusan yang dibuat oleh Mahkamah Perusahaan. Certiorari hanya diberikan dalam kes di mana keputusan dibuat oleh Mahkamah Perusahaan tetapi hanya berhubung merit keputusan yang dibuat (lihat perenggan 42).

(4) Permohonan untuk certiorari seperti yang dipohon oleh responden di Mahkamah Tinggi ditolak. Pengerusi yang bijaksana, sepertimana yang dilihat daripada alasan keputusannya, telah menggunakan pendekatan yang betul untuk rujukan tersebut di bawah s 20 Akta tersebut. Pada mula lagi, beliau telah bertanyakan diri sendiri persoalan yang betul, iaitu sama ada responden telah dipecat tanpa sebab atau alasan yang adil (lihat perengan 43).

(5) Pengerusi yang bijaksana tidak melakukan kesilapan undang-undang. Beliau telah menggunakan prinsip-prinsip yang beliau perlu patuhi dalam pengendalian representasi di bawah s 20 Akta tersebut dan mendapati berdasarkan fakta yang sedia ada kepadanya bahawa pemecatan responden menunjukkan ia dijustifikasikan. Beliau berpuas hati bahawa perayu telah menunjukkan bahawa keputusan untuk memecat responden di bawah keadaan tersebut, satu keputusan yang munasabah dan adil dan kecuaian responden menghilangkan pas-pas keselamatan merupakan cukup serius untuk mewarankan pemecatan (lihat perenggan 44).

(6) Perintah mandamus yang diberikan oleh hakim Mahkamah Tinggi yang bijaksana diketepikan. Mandamus tidak boleh kekal kerana dua sebab. Pertamanya, memandangkan tiada certiorari dikeluarkan untuk membatalkan award Mahkamah Perusahaan maka award Mahkamah Perusahaan itu masih kekal. Keduanya, mandamus dikeluarkan selepas Mahkamah Tinggi menggunakan kuasa rayuan dan bukan proses semakan kehakiman. Keputusan

hakim yang bijaksana bahawa Mahkamah Perusahaan terkhilaf jelas menunjukkan penggunaan kuasa rayuan yang tidak diwarankan. Mahkamah Tinggi tidak patut campur tangan dengan keputusan Mahkamah Perusahaan kecuali jika terdapat kesilapan undang-undang. Pembacaan penghakiman hakim yang bijaksana menjadikan ia jelas bahawa beliau mengkritik penemuan Mahkamah Perusahaan berdasarkan kebolehpercayaan saksi-saksi. Ini bukan dalam skop semakan kehakiman dan oleh sebab itu penghakiman hakim yang bijaksana tidak boleh kekal. Mandamus tidak boleh dikeluarkan dalam keadaan sedemikian. Hakim yang bijaksana telah melampaui peranannya sebagai mahkamah semakan kehakiman (lihat perenggan 45)]

Notes

For cases on award of Industrial Court, see 8(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 1241–1288.

Cases referred to

Harpers Trading (M) Sdn Bhd v National Union of Commercial Workers [1991] 1 MLJ 417 (folld)
Harris Solid State (M) Sdn Bhd v Bruno Gentil s/o Pereira [1996] 3 MLJ 489
Kumpulan Peransang Selangor Bhd v Zaid bin Hj Mohd Noh [1997] 1 MLJ 789
Nadarajah & Anor v Golf Resort (M) Bhd [1992] 1 MLJ 506
North Wales Police v Evans [1982] 3 All ER 141
Telekom Malaysia Kawasan Utara v Krishnan Kutty a/l Sanguni Nair & Anor [2002] 3 MLJ 129

Legislation referred to

Court of Judicature Act 1964 s 69(1), (4)
Industrial Relations Act 1967 ss 20, 30(5), 33B(1)

P Mithran (Dass, Jainab & Associates) for the appellant.
PG Jayendra (S Shankar with him) (Jay & Co) for the respondent.

Mohd Ghazali JCA (delivering judgment of the court):

[1] The respondent, who was an employee of the appellant, a locally incorporated company, considered that he was dismissed by the appellant without just cause or excuse and hence made representations in writing to the Director General for Industrial Relations pursuant to the provisions of s 20 of the Industrial Relations Act 1967 ('the Act') to be reinstated to his former employment. The representations were subsequently referred to the Industrial Court for an award. On 23 January 2001, the Industrial Court concluded that the respondent's dismissal was with just cause and excuse and hence dismissed the claim.

[2] The respondent, upon leave being granted by the High Court, applied for an order of certiorari to quash the award of the Industrial Court and for an order of mandamus to direct the Registrar of the Industrial Court to fix the matter for re-adjudication before another Chairman of the Industrial Court. At the end of the day, the learned judge of the High Court ordered that mandamus be issued directing

the Registrar of the Industrial Court to fix the matter for re-adjudication before another Chairman. He did not however make any order with regards to the application for certiorari. The appellant appealed to this court.

[3] The facts showed that the appellant is the owner of a building known as Menara PanGlobal ('the building'). The respondent commenced employment with the appellant as a building supervisor on 2 February 1993. On 26 February 1997, he was transferred to the security department as a loading bay supervisor. As a loading bay supervisor, his duty included the issuing of visitor security passes ('the security passes') to persons entering the building.

[4] On 10 January 1998, the appellant issued to the respondent a show cause letter pertaining to 10 security passes which went missing the day earlier. That letter reads:

> Dear Mr Nathan,
>
> MISSING OF VISITORS PASSES — SHOW CAUSE LETTER.
>
> The above matter bears reference.
>
> It was reported by the Safety and Security Manager, Capt ® Nazri Abdullah that on the 9th January 1998, at about 5.00 p.m. you failed to return 10 visitors passes belonging to Menara PanGlobal Sdn Bhd to Security Department upon completing your duty for the day.
>
> The 10 visitors passes were collected by you from the morning shift ASO, Nizar Hussin at the security control room at about 9 a.m. on the same day.
>
> The management view the above misconduct seriously as visitors passes are one of the company's security control measures and is a company's controlled item. Losing those passes is a serious misconduct as it could bring serious discredit to the company. By losing those passes, you have breach the trust given to you by the company to ensure the safety of the company's property.
>
> You are hereby given until 10am on Monday, 12th January 1998 to reply to this show cause letter in your own hand writing and why disciplinary action cannot be taken against you.
>
> The management will decide on the necessary disciplinary action should you fail to reply to this letter by the above stated date.

The respondent replied by letter dated 11 January 1998 which read as follows:

> Dear Madam,
>
> MISSING OF VISITORS PASSES
>
> With ref to your letter dated 10 Jan 98 regarding the above matter, I would like to bring to your attention that safety and security manager Capt ® Nazri Abdullah was aware and knew that the 10 passes were missing because at 1410hr he came and particularly asked for the passes. When I check in the drawer, to my shock and horror the passes were missing.
>
> Capt Nasri immediately told me to resign and that I can't work with him.
>
> Please understand that not for one or two days but for the past 9 months I have always kept those passes in the drawer before I go for my lunch or to the loo. It was always there.

I don't believe outsiders taking it away because those passes can't benefit them in any way.

I am still wondering what made Capt Nasri to ask for the passes at 1410hrs. He has never this before. He never waited for me to report this matter to him at 1650hrs or 1700hrs as claimed by him, which is not true.

This is all for now. Thank you.

By letter dated 14 January 1998, the appellant replied, inter alia, as follows:

We regret to inform you that your reply to our letter regarding your negligence on 9 January 1998, resulting in the losses of ten (10) visitors passes belonging to the company is unsatisfactory.

You are hereby required to attend an inquiry at 2.30pm on 16 January 1998 at the 23rd floor boardroom, and to show why disciplinary action should not be taken against you.

You may bring your witnesses if any.

Should you fail to attend this inquiry, it will be held in your absence and a decision will be made in spite of your absence.

The domestic inquiry was held as scheduled on 16 January 1998. Subsequently by letter dated 19 January 1998 the appellant wrote to the respondent as follows:

Dear Mr Nathan

NEGLIGENT — TERMINATION OF CONTRACT OF SERVICES

The Domestic Inquiry held at about 2.30pm on 16 January 1998 in the 23rd floor Boardroom bears reference.

The panel members have found you guilty of the charge on your negligence in carrying out your duty on the 9 January 1998, resulting in the loss of ten (10) visitors passes belonging to the company.

As a Supervisor, the company has given you the trust to ensure the safety of any company's property or properties entrusted to you. Your failure to carry out your responsibility in this case contravenes Section 14(1) as stated in The Employment Act which allows the company to terminate your contract of services immediately.

The management has decided to terminate your services with Menara PanGlobal Sdn Bhd with effect from 20 January 1998. Your last working day will be 19 January 1998 and you will be paid the one month in lieu of notice.

Kindly complete all other clearance procedures with Menara PanGIobal Sdn Bhd.

[5] The matter was referred to the Industrial Court pursuant to s 20(3) of the Act for an award. In his statement of case filed in the Industrial Court the respondent, inter alia, contended that he was dismissed without just cause or excuse and prayed that the court will hand down an award finding the dismissal wrongful, void and inoperative and further order reinstatement without any loss of wages, seniority and such other benefits otherwise earned or any other relief which the court deems fit and proper to grant.

[6] On 23 January 2001, the Industrial Court concluded that the respondent's dismissal was with just cause and excuse and dismissed the respondent's claim. Consequently the respondent applied to the High Court for judicial review. A

[7] Before the Industrial Court, the appellant called three witnesses. The first witness, Captain ® Muhammad Nazri bin Abdullah, the appellant's chief security officer stated that his duties were related to the security of the building. He has to see to the security of the appellant's property and of the staff and has to ensure that the entry and exit points to the building are well secured. He has the right to make spot checks at anytime. On 9 January 1998, while making his rounds in the building, he went to the loading bay of the building situated at the 4th floor car park where he met the respondent. He then asked the respondent about the security passes in the latter's possession. The respondent henceforth opened the drawer to his table and could not find the security passes. Upon questioning him, the respondent replied that the security passes were on his brother's motorcycle. The respondent also said that he did not go out during lunch hour that day. Captain ® Muhammad Nazri bin Abdullah then directed the respondent to find the security passes. He later told the duty security officer, one Nizar bin Hussein to make sure that the respondent return the security passes at the end of his shift that day. The respondent did not return the security passes that day as directed. B C D

[8] In his evidence, Captain ® Muhammad Nazri bin Abdullah stated that the security and safety of the security passes was an important matter to the appellant 'because any person who is in possession of the passes would gain full access to the building, and that losing passes is the most serious offence that any security guard could commit'. He stated that the respondent's main responsibility was to ensure that all visitors and suppliers to the building have to surrender their national registration identity cards before being issued with a security pass. The security passes are important to the appellant because anyone in possession of these passes can gain full access to the building and this could jeopardise the security and safety of the tenants of the building and the appellant's property if the passes were to fall into wrong hands. The respondent was issued with ten security passes on a daily basis and at the end of his shift must surrender the passes to the security control room. During the respondent's shift, a table with a locked drawer is provided for his use and when he goes off duty he must surrender the security passes to the security control room. During lunch break, if he is going out for lunch, he must hand over the security passes and his walkie-talkie to the security control room. Captain ® Muhammad Nazri bin Abdullah stated that the ten missing security passes were eventually found almost a week after the incident in front of a building named MUI Plaza by a lecturer from Stamford College. E F G H

[9] The second witness, Hawa bte Ma'arof, the appellant's then Human Resources Manager stated that the appellant treated the loss of the security passes as a serious misconduct. She stated that the domestic inquiry consisted of a panel of three I

('the panel') and she was the prosecuting officer. The panel recommended that the respondent's contract of service be terminated on finding him guilty of negligence. She stated that the panel 'established that there was a breach of trust in regard to the Company's rules and regulations as stated in the Employees Hand Book — p 14'. Page 14 of the appellant's 'Employees Hand Book' read as follows:

> Dismissal From Employment
>
> Although it is not a common practice, the company may terminate your employment without prior notice (immediate dismissal) or salary in lieu of notice based on the following circumstances —
>
> - Theft or fraud related to company finances or property
> - Criminal breach of trust
> - Physical violence displayed on work premises
> - Wilful destruction of company property
> - Disclosure of company secrets
> - Possession or consumption of unlawful or illegal items or substances on work premises
> - Gross Insubordination
> - Conduct that could bring serious discredit to the company
> - Conviction of any criminal offence (other than an offence that in the opinion of the company, does not directly affect the employment)
> - Mental and physical illness that renders you unfit for employment as deemed by the company doctor
> - Reporting to work while under the influence of alcohol or illegal drugs.

The third witness, Adeline Yap Soh Yee who was the chairperson of the panel stated the findings of the panel were as follows:

(i) the respondent did not frequently check the security passes;

(ii) the respondent was not sure whether the security passes were kept in the drawer of his table or on his brother's motorcycle;

(iii) the respondent did not lock the drawer of his table during lunch or in his absence;

(iv) the respondent did not take proper care of the security passes.

[10] She also stated the respondent was not very sure of his answers during the domestic inquiry but he did admit that it was his responsibility to take care of the security passes and knew its importance. At the end of the domestic inquiry, the anel recommended that he be terminated as they found that he was negligent. She stated that the panel referred to p 14 of the appellant's 'Employees Hand Book' and had considered whether the respondent's act of losing the security passes was tantamount to a 'criminal breach of trust' but eventually decided that he was negligent and that his conduct has caused 'serious discredit to the Company' and that what he did was 'serious enough to warrant termination'.

[11] Before the Industrial Court, the respondent claimed that during the course of the domestic inquiry he was not allowed to be present. He said:

> The Company did produce witness during the Domestic Inquiry. They were Nizar bin Hussain, Singnan bin Said and COW-1 [*Captain ® Muhammad Nazri bin Abdullah*]. During the Domestic Inquiry the 3 witnesses were called one by one. When they were called I was outside the room. The door was closed. I was outside because I was asked to go out of the room. When they were asking question of the 3 witnesses one by one I was not in the room. I was not given an opportunity to ask the 3 witnesses questions. After the three witnesses gave evidence, COW-2 [*Hawa bte Ma'arof*] called me into the room and told me I could carry on with my job.

[12] Under cross-examination, the respondent denied having informed any security officer that the security passes were in his bag and that the bag was with his brother or that the passes were with his brother in the latter's motorcycle basket. He insisted that he kept the security passes in the drawer to his table and was shocked to find them missing. He agreed that if someone were to find the security passes and use them, that person could get access to the building. He also agreed that it was his duty and responsibility to take care of the security passes.

[13] In relation to the domestic inquiry he said he was the first person to give evidence. He said:

> When I was asked by the Panel about the missing passes I told them I put in the drawer and went up to the cafeteria for lunch. After lunch I came back. COW-1 [*Captain ® Muhammad Nazri bin Abdullah*] asked me for the passes. I open the drawer but passes missing.

[14] The respondent later admitted in the proceedings before the Industrial Court that he had lost the security passes. In relation to this, the transcript of the notes of proceedings before the Industrial Court showed the following:

> Put: Do you think you were negligent in losing the passes.
>
> Answer: I admit loses (*sic*) the passed (*sic*).'

[15] The Industrial Court, in its award, found in favour of the appellant. In coming to that conclusion, the learned Chairman said:

> After carefully considering the pleadings, the totality of the oral and documentary evidence, and the written submissions this Court finds in favour of the Company which the Court holds has proved on a balance of probabilities that its dismissal of the Claimant was with just cause or excuse.

[16] Thus, the learned Chairman found that the appellant has proved on a balance of probabilities that the dismissal of the respondent was with just cause and excuse. He noted in his award the following:

> The Claimant was dismissed after a Domestic Inquiry had found him guilty of a serious misconduct which was that he was negligent while carrying out his duty on 9 January 1998

resulting in the loss of Company's visitors passes. That the passes went missing is not disputed; the circumstances surrounding their disappearance are. The Claimant says that they went missing after his lunch break from the drawer for which no key and lock were provided. COW-1 on the other hand in his evidence stated that during his shift a table with a locked drawer is given to him. He added that during the complainant's lunch break he should hand over the passes and walkie talkie to Security Control if he is going out for lunch or if he intends to eat at the cafeteria.

[17] The learned Chairman was of the view that the respondent was negligent in carrying out his duties on 9 January 1998 thereby resulting in the loss of the security passes. He said this action amounted to a misconduct which was serious enough to warrant his termination.

[18] In relation to the claim of the respondent that he was not allowed to cross-examine the witnesses during the domestic inquiry before the panel, the learned Chairman said:

> This Court finds that by and large, the Domestic Inquiry did observe the rules of natural justice in that it acted without bias and it did give the Claimant an opportunity to be heard. Opportunity to be heard means an opportunity to present one's side of the story but does not necessarily mean an opportunity to cross examine witnesses. This Court finds that the conduct and verdict of the Domestic Inquiry cannot be faulted or characterised as bad or defective. The non-tendering of the notes of the Inquiry in Court does not in any way detract from the fact that the Inquiry was properly and regularly conducted and that it had before it ample evidence to arrive at its finding as in COE '27'. In *Kuala Lumpur Hilton v National Union of the Hotel, Bar & Restaurant Workers* (1983) 1 ILR 31 at p 32, the Court held:
>
> > It is alleged by the union that the domestic inquiry was bad…. It is this Court's view that so long as the basic requirements of natural justice are observed no strict rules of procedure need be followed. From the evidence of Encik William Paul Kularajah, CW 6 who as Chairman had conduct of the Inquiry and upon perusal of the Notes of Proceedings of the Inquiry the Court finds that the Claimant was informed of the charges against him and he was given ample opportunity of denying or explaining the alleged misconduct. The Court is satisfied that the Inquiry was conducted properly and in accordance with the Rules of Natural Justice…
>
> Order:
>
> Based upon the above reasons this Court concludes that the Company's dismissal of the Claimant was with just cause or excuse. As such this Court orders that the Claimant claim of being dismissed without just cause or excuse be dismissed.'

In his grounds of judgment, the learned judge of the High Court noted that the learned Chairman, in his award, said as follows:

> It was submitted by the Claimant that there was no evidence adduced and proven in court that it was the Claimant who lost the passes. Be that as it may this court is of the opinion that what really matters is that the Claimant was issued with 10 visitor passes on the morning of 9 January 1998 and that he was negligent in carrying out his duty on 9 January 1998 resulting in the loss of those visitor passes. This action of the Claimant amounted to misconduct, which was serious enough to warrant his termination.

In relation to above, the learned judge said:

> It is noted that by this statement the Court seems to agree that there was no evidence adduced that the Applicant lost the passes. However the learned Chairman goes on to state that the Applicant was negligent and that his negligence resulted in the loss of the passes. I think this finding is untenable and perverse. The Court did not provide reasons as to how it arrived at the finding that the Applicant's actions had resulted in the losses (sic) of the passes. The Court instead acknowledges the fact that insufficient evidence was adduced to prove that the Applicant lost the passes. It is trite that the burden of proof is on the Company to show that the worker was guilty of the charges preferred against him.

[19] As such, the learned judge held that the learned Chairman erred in law and fact in arriving at the decision that the respondent was negligent in performing his duties which resulted in the loss of the security passes. He was of the view that as this fact had not been proved by the appellant, the decision of the learned Chairman is perverse.

[20] The learned judge also noted that it was the contention of the appellant that the respondent had admitted that he gave the security passes to his brother and that the learned Chairman seems to accept this contention as can be seen at page 11 of the award where the learned Chairman said:

> The Company's evidence vide the report (COE-'8') lodged by the Security Officer Sing Wan is that when he asked the Claimant where the passes are the Claimant replied that the passes were kept with his brother in the motorcycle basket. Even though Sing Wan was not called as a witness this Court being a Court of equity and good conscience admitted it as an exhibit since it was made by Sing Wan to COW-1 [Captain ® Muhammad Nazri bin Abdullah]. Furthermore this report corroborates the report COE-'6' made by COW-1 in which COW-1 states that the Claimant when questioned by the duty guard said that the passes were:
>
> > 'left on his motorbike. I told him to look for the passes. He came back a little while and said 'Captain, I left in the bag and the bag is with my brother'.

[21] On this issue, the learned judge was of the view that the report marked COE-'8' should not have been admitted in evidence as its maker was not called. He said that that report was used by the Industrial Court to arrive at the apparent finding that the respondent had given the passes to his brother, although the respondent denied this. The learned judge noted that that report was used to corroborate the report marked COE-'6' which was made by Captain ® Muhammad Nazri bin Abdullah. This, the learned judge said, 'seems to be self-fulfilling'; he said:

> COE-'8' is a report supposedly made by Sing Wan to COW-1 [*Captain ® Muhammad Nazri bin Abdullah*], who then in turn uses it to corroborate his own report, COE-'6', in which he states that the Applicant admitted to him that he (the Applicant) gave the passes to his brother. The Court should have viewed this type of self-fulfilling evidence with greater scrutiny than it did. This is especially so when the Applicant was not given the opportunity to cross-examine the said Sing Wan on his supposed statement. What we therefore really have is the testimony of COW-1 [*Captain ® Muhammad Nazri bin Abdullah*] alone. This is insufficient to tip the burden of proof, in the light of the Applicant's testimony to the

> contrary. Another point is that the Company did not plead this fact in the Statement in Reply, i.e. that the Applicant had given the passes to his brother. This I think is fatal to the Company's contention that the Applicant had given the passes to his brother. Such a fact is not merely ancillary to the case, but would be central to the case. It should therefore have been pleaded by the Company if it wanted to depend on such a fact. The Industrial Court erred in law in taking into consideration this particular point in arriving at its decision. It is clear from the Award that his (sic) unpleaded point was depended on by the Court in arriving at its decision. The finding and decision is therefore wrong in law, and perverse.

[22] The learned judge was also of the view that the learned Chairman erred in law when he failed to take into account the fact that the security passes that were missing were found three days after the respondent was dismissed. On this issue, the learned judge held the learned Chairman failed to take into account the fact there was a possibility that other parties had taken the security passes. He noted that *Captain ® Muhammad Nazri bin Abdullah* testified that the security passes were found almost a week later after the date of the incident in front of MUI Plaza by a lecturer from Stamford College. On this issue, the learned judge in his judgment put forth the following questions:

(i) If the respondent had given the security passes to his brother, as alleged by the appellant, how could the passes be found in another place after his dismissal?

(ii) If the respondent was truly guilty, would he not have destroyed the security passes?

(iii) Could a third party have taken the security passes and thrown them somewhere else as a prank?

After posing these questions, the learned judge said:

> These are factors that the Industrial Court did not even consider. If the Court had properly considered this piece of evidence it might have arrived at the finding that someone else had intentionally taken the passes. It must be remembered here that the (sic) COW-1 [*Captain ® Muhammad Nazri bin Abdullah*], the Applicant's superior, suddenly asked the Applicant where the passes were on 9 January 1998. Why did he suddenly ask for the passes? Did he know that they had been removed? Did he remove them? These are questions he (*sic*) learned Chairman failed to consider in the Award. His failure to do so is an error of law as he has failed to take into consideration a vital piece of evidence. At the very least the evidence against the Applicant is inconclusive.

[23] In relation to the decision by the appellant to dismiss the respondent, the learned judge noted 'that it is undisputed that the Company did not suffer losses of any kind'. With regards to the punishment meted out by the appellant, he said:

> The person who recommended the Applicant's dismissal did so on the basis of her belief that the Applicant had brought discredit to the Company. This point was not, however, proved in Court. If the reason for the dismissal cannot be proved the Company's case would fail.

The learned judge also said:

> The Company has not proved that the punishment of dismissal was merited on the facts of this case even if the Applicant had been guilty of losing the passes. Dismissal must not necessarily be the only punishment meted out. The Industrial Court failed to give sufficient consideration to this point'

He subsequently said:

The Court merely held that:

> 'This action of the Claimant amounted to a misconduct, which was serious enough to warrant his termination.

I think such a finding without further clarification as to why the alleged misconduct is serious enough to warrant dismissal especially in the light of the scanty evidence is fatal. The learned Chairman failed to take into account the admissions by the Company's witnesses that there had been no loss or damage suffered by the Company. The learned Chairman seems to have rushed through the factual elements of the case, thus rendering his decision perverse. It is settled law that the burden of proof lies on the Company in dismissal cases. In the instant case it is apparent from the evidence that the Company considered the Applicant as having committed a criminal breach of trust (CBT). This is apparent from p 33 of the Notes of Evidence where COW-3, the Chairperson of the panel of inquiry stated as follows:

> I have seen COE29A when I first joined the Company I was given a copy of COE27A. When we were deliberating on the action to be taken we did refer to COE29A especially to p 14, ie criminal breach of trust.

This is evident that the Company's action of dismissing the Applicant was based on the fact that the Company thought that the Applicant's alleged actions amounted to a criminal breach of trust. If so, the Company must prove such breach. This it did not do. CBT was not even pleaded. It did, however, weigh on the minds of the decision makers in respect of the Applicant's dismissal. Was this fact considered by the Industrial Court? It was not. If this point had been considered by the learned Chairman of the Industrial Court, he may have reached the decision that the Company has failed to prove the actual reasons for the Applicant's dismissal, ie that he had allegedly committed CBT. The losing of the passes, even if proven, does not amount to proof of CBT. The Industrial Court again failed to carry out an in-depth analysis of the evidence before it, and therefore arrived at a perverse decision.

[24] In conclusion, the learned judge said 'the Industrial Court has clearly acted erroneously' and that 'it is well settled that any error of law would mean that the Award was made without jurisdiction'. For these reasons the learned judge ordered that mandamus be issued to direct the Registrar of the Industrial Court to fix the matter for re-adjudication before another Chairman.

[25] As discussed earlier, the learned judge did not make any order in relation to the application for certiorari but ordered that mandamus be issued directing the Registrar of the Industrial Court to fix the respondent's case for re-adjudication before a different Chairman. The appellant is now appealing against the whole decision of the learned judge. In his submission, learned counsel for the respondent claimed that he is cross-appealing on the learned judge's omission to quash the award of the Industrial Court which he submitted was unintentional in the light that mandamus was granted for re-adjudication of the entire matter. I have not however sighted the respondent's notice of appeal in my copy of the appeal record.

[26] Be that as it may, s 69(1) of the Court of Judicature Act 1964, inter alia, provides appeals to this Court shall be by way of re-hearing and in relation to such appeals this court shall have all the powers and duties of the High Court. Section 69(4) of the Court of Judicature Act 1964 provides this court may, inter alia, give any judgment and make any orders which ought to have been given or made. The learned judge did not make any order as to the application for certiorari and that being so, the decision of the Industrial Court, strictly speaking, still stands. I cannot infer or assume that the learned judge 'had inadvertently omitted' to allow the prayer for certiorari as learned counsel for the respondent has put it in his submission. That being the position, I would approach this appeal by first considering whether this is a fit and proper case for certiorari to be issued.

[27] The remedy by way of certiorari is an extraordinary jurisdiction and a discretionary remedy with the High Court. In his book entitled *Administrative Law of Malaysia and Singapore*, Professor MP Jain, in relation to the remedy, made the following observations:

(i) certiorari has emerged into a general remedy for the control of decisions by the administration affecting the rights of the people;

(ii) certiorari is issued when the body in question has completed its work, disposed of the matter and given its determination; certiorari is thus issued to quash such a determination;

(iii) certiorari is issued when an adjudicatory body has infringed norms of natural justice, or acts under an invalid law, or commits errors of jurisdiction, or there is an error of law apparent on the face of the record, or where its decision is based on findings of fact for which there is no legal evidence in support.

[28] In *Harpers Trading (M) Sdn Bhd v National Union of Commercial Workers* [1991] 1 MLJ 417, in delivering the judgment of the Supreme Court, Jemuri Serjan SCJ (as he then was) said (at p 419):

> It seems to us that it should be treated as trite law that judicial review is not an appeal from a decision but a review of the manner in which the decision was made and the High Court is not entitled on an application for judicial review to consider whether the decision itself, on the merits of the facts, was fair and reasonable. There is no dearth of authorities on this proposition…;

and at p 421:

> On the authorities quoted above it is not the function of the High Court in exercise of its supervisory jurisdiction to hear a dispute 'de novo' and decide it on its merits.

In *Telekom Malaysia Kawasan Utara v Krishnan Kutty a/l Sanguni Nair & Anor* [2002] 3 MLJ 129 Abdul Hamid Mohamad JCA (as he then was) said (at pp 136–137):

> Section 33A empowers the Industrial Court to refer questions of law to the High Court. A decision of the High Court in such a reference 'shall be final and conclusive and no such decision shall be challenged, appeal against, reviewed, quashed or called in question in any other court or before any authority, judicial or otherwise, whatsoever'.

Regarding the award of the Industrial Court, s 33B(1) provides:

> Subject to this Act and the provisions of s 33A, an award, decision or order of the court under this Act (including the decision of the court whether to grant or not to grant an application under s 33A(1)) shall be final and conclusive, and shall not be challenged, appealed against, reviewed, quashed or called in question in any court.

[29] Be that as it may, it is now established law that the court may, through judicial review quash such awards. In so doing, the court again, over the years, have expanded the grounds for judicial review, giving itself wider powers to intervene in the decisions of the Industrial Court. Now, should the court also, through judicial review, introduce the technicalities of the court of law to the Industrial Court, the very thing that the creation of the Industrial Court was meant to avoid? We do not think so.

[30] In *Wong Yuen Hock v Syarikat Hong Leong Assurance Sdn Bhd and another appeal* [1995] 2 MLJ 753, the Federal Court held at p 762:

> On the authorities, we were of the view that the main and only function of the Industrial Court in dealing with a reference under s 20 of the Act (unless otherwise lawfully provided by the terms of the reference) is to determine whether the misconduct or irregularities complained of by the management as to the grounds of dismissal were in fact committed by the workman, and if so, whether such grounds constitute just cause or excuse for the dismissal.

[31] In *Dr A Dutt v Assunta Hospital* [1981] 1 MLJ 304, Hashim Yeop A Sani J, delivering the judgment of the court said at p 307:

> It must not be forgotten that the Industrial Court is essentially a court of arbitration especially for the purpose of dealing with any trade dispute referred to it (s 22(1) [of the Industrial Relations Act 1967]).

[32] In *Harris Solid State (M) Sdn Bhd v Bruno Gentil s/o Pereira* [1996] 3 MLJ 489, Gopal Sri Ram JCA delivering the judgment of the court said at p 510:

> Further, s 30(5) of the [Industril (sic) Relations] Act [1967] imposes a duty upon the Industrial Court to have regard to substantial merits of a case rather than to technicalities. It also requires the Industrial Court to decide a case in accordance with equity and good conscience.

[33] In *Nadarajah & Anor v Golf Resort (M) Bhd* [1992] 1 MLJ 506, Eusoff Chin J (as he then was) says at p 511:

> It is therefore to be observed that in view of the provision of s 30(5) of the [Industrial Relations] Act [1967], the Industrial Court must act according to equity, good conscience and the substantial merits of the case *without* regard to technicalities and legal form. Technical rules such as estoppel, limitation, laches, acquiescence, etc (unless otherwise provided for in the Act) have no place in industrial adjudication and they should not be allowed to be invoked for defeating claims which are just and proper. (Emphasis added.)

This passage was quoted with approval by the Supreme Court in *Kumpulan Peransang Selangor Bhd v Zaid bin Hj Mohd Noh* [1997] 1 MLJ 789, at p 800:

> From all these, it is quite clear to us that the Industrial Court should not be burdened with the technicalities regarding the standard of proof, the rules of evidence and procedure that are applied in the court of law. The Industrial Court should be allowed to conduct its proceedings as a 'court of arbitration', and be more flexible in arriving at its decision, so long as it gives special regard to substantial merits and decide a case in accordance with equity and good conscience.';

and at p 138:

> The Supreme Court of India in *Management of Balipara Tea Estate v Its Workmen* AIR 1960 Supreme Court 191, says:
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> > In making an award in an industrial dispute referred to it, the tribunal has not to decide for itself whether the charge framed against the workman concerned (in this case falsification of accounts and misappropriation of funds) has been established to its satisfaction; it has only to be satisfied that the management of a business concern was justified in coming to the conclusion that the charge against its workman was well founded. If there is finding by the tribunal that management has been actuated by any sinister motives, or has indulged in unfair labour practice, or that the workman has been victimized for any activities of his in connection with the trade unions, it may have reasons to be critical of the enquiry held by the management.
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> > The tribunal misdirects itself in so far as it insists upon conclusive proof of guilt to be adduced by the management in the inquiry before it. It is well settled that a tribunal has to find only whether there is justification for the management to dismiss an employee and whether a case of misconduct has been made out at the inquiry held by it.

and at pp 140–141:

> It should be remembered that the question of standard of proof is closely connected with the question of finding of facts. For a summary of the law, it is sufficient to quote some relevant passages from MP Jain's *Administrative Law of Malaysia and Singapore* (3rd Ed), beginning from p 714:
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> > The courts have emphasized time and again that certiorari should not be used by way of a disguised appeal from findings of fact. The courts have thus laid down the norm that they would not interfere with the findings of fact by a body unless the same are completely unsupported by any evidence. This is known as the 'no evidence' rule. A finding having no evidence to support it is characterized as a 'perverse' finding of fact; it is regarded as an effort of law and is quashed. If, however, there is some evidence to support a finding of fact, the courts do not interfere with it. The courts do not regard it as their function to interfere with the findings of fact by a body merely because of insufficiency or inadequacy of evidence.
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> > …
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> > If there is some evidence to support a finding of fact, it is not then for the courts to go into the sufficiency or adequacy of the evidence. It is not the court's function to review, reassess, reappreciate, reappraise evidence, or draw its own inferences as to facts from the evidence. The court will not interfere merely because it may come to different conclusions on facts on the basis of the same evidence. The court has to take the evidence as it stand

and not go into the question of its reliability in a petition for certiorari. A finding based solely on conjecture, surmise or suspicion is a finding based on no evidence. Such a finding can be quashed by the court. If there is some evidence to support a finding, then the court would not quash the finding on the ground that the evidence was insufficient. But when there is absolutely no evidence on record to support a finding, then the court will interfere.

…

As regards findings of fact by the Industrial Court, the Federal Court observed in *Non-Metallic Mineral Products Manufacturing Employees Union v South East Asia Fire Bricks Sdn Bhd* [1976] 2 MLJ 67 at p 69:

That tribunal was charged with findings of fact, and unless it can be shown that the evidence was so much one way that no reasonable tribunal could have disregarded it, it is not possible to interfere with its findings of fact.

Again rejecting an application for certiorari against a decision of the Industrial Court, the Supreme Court observed in *Harpers Trading (M) Sdn Bhd v National Union of Commercial Workers* [1991] 1 MLJ 417 at p 421:

Weighing and assessing the evidence of the witnesses is the function of the Industrial Court and not that of the High Court.

[34] In the instant appeal, the appellant's case against the respondent is clear, namely, the charge against him is that at 9am on 9 January 1998, when he began his shift, he collected 10 security passes from the appellant's security control room and failed to return the said passes at 5pm the same day. At about 2.10pm the same day, Captain ® Muhammad Nazri bin Abdullah, the appellant's chief security officer carried out a spot check and discovered that the respondent could not produce the security passes. The respondent then informed Captain ® Muhammad Nazri bin Abdullah that the security passes were on his brother's motorcycle. The security passes are important to the appellant as any person who is in possession of such a pass can gain access to the building which could jeopardize the security and safety of the tenants of the building and the appellant's property if such pass would fall into wrong hands. This is the appellant's case against the respondent.

[35] A domestic enquiry was held and he was found guilty of being negligent in carrying out his duties on the material date, ie, 9 January 1998 which resulted in the loss of the 10 security passes. He was consequently dismissed. The matter was then referred to the Industrial Court for an award. At the end of the proceedings, the learned Chairman concluded that the respondent's dismissal was with just cause and excuse and dismissed his claim. The learned Chairman made a finding of fact that the security passes that were in the custody of the respondent on the material date were lost due to his negligence and that this amounted to a misconduct which was serious enough to warrant his dismissal. He also found that the panel conducting the domestic inquiry did observe the rules of natural justice and had acted without bias and gave the respondent an opportunity to be heard. The respondent himself admitted that he was responsible for the safekeeping of the security passes and had lost the passes.

[36] From my reading of the grounds of judgment of the learned judge, I am of the view that he had approached this application for judicial review as if it was an appeal from a lower court. He substituted his own views to that of the learned Chairman and had come to different conclusions on facts on the basis of the same evidence as illustrated below, namely:

(i) The learned Chairman found that the security passes that were in the custody of the respondent on the material date were lost due to his negligence but the learned judge was of the view that this finding was untenable and perverse even though the respondent himself admitted that he was responsible for the safekeeping of the passes and that he had lost the passes on the material date.

(ii) Captain ® Muhammad Nazri bin Abdullah testified in the proceedings before the Industrial Court that the respondent informed him, when he made the spot check at 2.10pm on the material date, that the security passes were on his brother's motorcycle. In the course of the proceedings a report (exh COE-'8') lodged by a security officer named Sing Wan was introduced and that report stated that the respondent had said that the security passes were kept in his brother's motorcycle basket. The learned judge was of the view that the learned Chairman should not have admitted this report, viz., exh COE-'8' as the maker, Sing Wan was not called as a witness and furthermore, Captain ® Muhammad Nazri bin Abdullah had also lodged a similar report (exh COE-'6'). To put it simply, the learned judge was of the view that exh COE-'8' cannot be used to corroborate exhibit COE-'6'. I cannot see the necessity of this exercise on corroboration when Captain ® Muhammad Nazri bin Abdullah himself testified that it was the respondent himself who informed him that the security passes were on his brother's motorcycle.

(iii) The learned judge was also of the view that it is fatal to the appellant's case to rely on exh COE-'8' and furthermore the appellant never pleaded that it is their contention that the respondent had given the security passes to his brother. I cannot see how this can be so. The contention of the appellant that the respondent had given the security passes to his brother is evidential and is not a point to be pleaded. Further, as discussed earlier, I cannot see how this can be fatal when the respondent himself stated that the security passes were on his brother's motorcycle.

[37] From the authorities discussed above, I would think that in dealing with judicial review a judge should have the following principles, inter alia, in the forefront of his mind:

(i) judicial review is not an appeal from a decision but a review of the manner in which the decision was made;

(ii) the High Court is not entitled on an application for judicial review to consider whether the decision itself, on the merits of the facts, was fair and reasonable;

(iii) the High Court, through judicial review, should not introduce technicalities of the court of law to the Industrial Court; this would certainly be so as s 30(5) of the Act imposes a duty upon the Industrial Court to have regard to

substantial merits of a case rather than to technicalities and it also requires the Industrial Court to decide a case in accordance with equity and good conscience;

(iv) the main and only function of the Industrial Court in dealing with a reference under s 20 of the Act is to determine whether the misconduct or irregularities complained of by the management as to the grounds of dismissal were in fact committed by the workman and if so, whether such grounds constitute just cause or excuse for the dismissal;

(v) the Industrial Court should not be burdened with the technicalities regarding standard of proof, the rules of evidence and procedure that are applied in the court of law;

(vi) the High Court will not interfere with finding of facts by the Industrial Court unless the same are completely unsupported by evidence and further, will not interfere merely because it may come to different conclusions on facts on the basis of the same evidence; weighing and assessing the evidence of the witnesses is the function of the Industrial Court and not that of the High Court.

[38] In the instant appeal, I would adopt what was said by Jemuri Serjan SCJ in *Harper Trading (M) Sdn Bhd v National Union of Commercial Workers*, at p 421, namely, 'It is surely not a case where the Industrial Court had acted on no evidence or had come to a conclusion which on the evidence it could not reasonably come'. At p 422 of the same, on the issue of the rules of evidence, Jemuri Serjan SCJ said:

> In *R V Deputy Industrial Injuries Commissioner, ex p Moore*, Diplock LJ at p 488 dealt with the nature of the evidence that might be accepted by a tribunal. This is what he said:
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> > These technical rules of evidence, however, form no part of the rules of natural justice. The requirement that a person exercising quasi-judicial functions must base his decision on evidence means no more than it must be based upon material which tends logically to show the existence or non-existence of facts relevant to the issue to be determined, or to show the likelihood or unlikelihood of the occurrence of some future event the occurrence of which would be relevant. It means that he must not spin a coin or consult an astrologer, but he may take into account any material which, as a matter of reason, has some probative value, the weight to be attached to it is a matter for the person to whom Parliament has entrusted the responsibility of deciding the issue. *The supervisory jurisdiction of the High Court does not entitle it to usurp this responsibility and to substitute its own view for his.* (Emphasis added.).

[39] In the instant appeal, the learned Chairman heard the facts, had seen the witnesses and had drawn his own conclusions from what was presented before him. Surely these are matters for the Industrial Court and not for the High Court to determine.

[40] The learned judge was also of the view that the appellant 'has not proved that the punishment of dismissal was merited on the facts of this case even if the Applicant [respondent] had been guilty of losing the passes'. On this issue, he said the finding of the learned Chairman that the action of the respondent in losing the security passes which amounted to a misconduct which was serious enough to warrant his

dismissal was perverse. The learned judge was of the view that the learned Chairman failed to take into account that the appellant did not suffer any loss or damage and that the learned Chairman 'failed to carry out an in-depth analysis of the evidence before it, and therefore arrived at a perverse decision'.

[41] I am of the view that the conduct of the respondent in losing the security passes was serious enough to warrant his dismissal. A person in possession of such a pass, without going through the formalities at the entry point to the building such as surrendering his identity card to the security guard on duty, can have access to the building. That would affect the safety and security arrangements which is the responsibility of the appellant to its tenants and staff. I do not think that the appellant need to prove that it has suffered actual loss or damage as a result of the loss of the security passes by the respondent. The appellant has considered that such negligence in losing or misplacing the security passes by a security guard is serious enough to warrant his dismissal. The learned Chairman of the Industrial Court was also of the view that such misconduct was serious enough to warrant a dismissal.

[42] Under the circumstances discussed above, I cannot find any ground for the court to issue certiorari to quash the decision of the learned Chairman. There is nothing to suggest that the decision to dismiss the respondent was irrational. The punishment of dismissal was proportionate under the circumstances of the case against the respondent. As discussed earlier, applications for prerogative orders are not appeals and neither the High Court nor this court is entitled to review the merits of any decision reached by the Industrial Court. It is well settled that certiorari is given only in cases where an error of law is disclosed. In the instant appeal, I am of the view that the learned judge, with greatest respect, did not seem to have directed his mind to the circumstances in which the decision was reached by the Industrial Court but only to the merits of the decision reached. In Chief Constable of the *North Wales Police v Evans* [1982] 3 All ER 141; [1982] 1 WLR 1155 at p 1173, Lord Brightman said:

> Judicial review is concerned, not with the decision, but with the decision-making process. Unless that restriction on the power of the court is observed, the court will in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power.

[43] In conclusion, I would dismiss the application for certiorari as prayed for by the respondent in the High Court. The learned Chairman, as can be seen from his grounds of decision, correctly approached the reference under s 20 of the Act. At the outset, he had asked himself the correct question, viz., whether the respondent had been dismissed without just cause or excuse. He said:

> 10. When the Industrial Court is dealing with a reference under Section 20, the first thing that the Court will have to ask itself a question whether there was a dismissal and if so whether it was with or without just cause *Wong Chee Hong v Cathay Organisation (M) Sdn Bhd* [1988] 1 MLJ 92 at p 95, Per Salleh Abas LP.
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> 11. After that the Court's function in dismissal cases on a reference under Section 20 becomes two fold: first to determine whether the misconduct complained of by the employer which resulted in his dismissal has been established; and secondly, whether the proven misconduct constitutes just cause or excuse for the dismissal see *Wong Yuen Hock v*

Hong Leong Assurance [1995] 2 MLJ 753 as reiterated by the Federal Court in *Milan Auto Sdn Bhd v Wong She Wen* [1995] 3 MLJ 537 per FCJ Azmi J.

12. To summarise this Court therefore has to:

(a) determine if the Claimant has been dismissed, and

(b) if the Court finds that the Claimant has been dismissed it has to go on to determine whether it was with just cause or excuse.

13. In doing so, this Court has to consider the reasons put forward by the Company for the Claimant's dismissal and determine whether the Company has proved them to the Court on a balance of probabilities. Even if the Company does succeed in proving these reasons, the Court has to determine in the final analysis whether they constitute just cause and excuse for dismissing the Claimant. In a dismissal case of this nature where the Claimant was dismissed for misconduct, the Company must produce convincing and cogent evidence that the Claimant committed the offence that he was alleged to have committed for which he was dismissed. The burden of proof lies on the Company on probabilities and it must adduce evidence to discharge this legal burden.

[44] It is my view that the learned Chairman has committed no error of law. He applied the principles that is required of him in dealing with the representation under s 20 of the Act and found on the facts available to him that the dismissal of the respondent has been shown to be justifiable. He was satisfied that the appellant has shown that the decision to dismiss the respondent was under the circumstances a reasonable and fair decision and that the negligence of the respondent in losing the security passes is of sufficient gravity to warrant dismissal.

[45] Thus, I would now formally dismiss the respondent's application for certiorari and dismiss his cross-appeal, if any, and uphold the award of the Industrial Court. I would also set aside the order of mandamus granted by the learned judge. The mandamus cannot stand for two reasons. Firstly, since no certiorari was issued to quash the award of the Industrial Court, strictly speaking, the award of the Industrial Court still stood. Secondly and more importantly, the mandamus was issued after the High Court had exercised appellate powers instead of judicial review process. The learned judge's conclusion that the Industrial Court erred was clearly an unwarranted exercise of appellate powers. The High Court should not interfere with the decision of an Industrial Court unless there is a real error of law. A reading of the judgment of the learned judge made it clear that he was criticising the Industrial Court's finding based on credibility of witnesses. This is wholly outside the scope of judicial review and for that reason alone the judgment of the learned judge cannot stand. A mandamus cannot be issued under such circumstances. It is my view that the learned judge exceeded his role as a court of judicial review which renders the cross-appeal, if any, academic. It is hereby dismissed. I would also order that the respondent pay the appellant costs here and below. The deposit is to be refunded to the appellant.

A **[46]** My learned brothers, Hashim Yusoff JCA and James Foong JCA have seen this judgment in its draft form and have conveyed their agreement to it and that it be the judgment of this court.

Appeal allowed.

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Reported by Peter Ling

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